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Unification, Funding, Discipline and Administration: Cornerstones for a New Judicial Article

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UNIFICATION, FUNDING, DISCIPLINE AND ADMINISTRATION: CORNERSTONES FOR A NEW JUDICIAL ARTICLE

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Witnesses appearing before the Judiciary Committee of the Washington Senate during the 1973 Session testified that the state's judicial system, although not a "basket case," clearly needs renovation.[1] This would seem a fair appraisal, one in which the legislature eventually concurred, at least in part.[2] Measured in relative terms by common criteria of chronological and geographical accessibility, the Washington courts score well. In absolute terms, there is ample room for improvement.

Need for adjustments in the structure and operation of the judiciary is occasioned by the same factors that require modification of other institutions[3] and is more accurately described as a continuing process than as a response to a specific crisis.[4] In recent years, however, de-

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1. *Hearings on Substitute S.J. Res. 113 Before the Senate Judiciary Comm.*, 43d Wash. Legis., 1st Ex. Sess., 1973. Statements were made by Ken Billington, Chairman, Citizens' Conference on Washington Courts; Joe Davis, Executive Secretary, Washington State Labor Council; Charles I. Stone, President, Washington State Bar Association; and Robert Utter, Justice, Washington Supreme Court.

2. H.R. Res. 121 (concurrent), 43d Wash. Legis., 1st Ex. Sess. (1973), acknowledges the need for data concerning the structure, personnel, and functioning of the Judiciary and directs the State Administrator for the Courts to initiate certain programs to correct this deficiency in information.

3. Chief Justice Burger has, for example, called attention to the need "to apply the techniques of modern business to the administration" of certain operations of the courts. Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970).

4. Roscoe Pound addressed the annual convention of the American Bar Association on Aug. 26, 1906. His speech was entitled "The Causes of the Popular Dissatisfaction with the Administration of Justice," and his opening sentence was: "Dissatisfaction with the administration of justice is as old as law." 46 J. AM. JUD. SOC'Y 55 (1962). Contemporary work by such stalwarts as Tom Clark, former Associate Justice of the United States Supreme Court, and Glenn Winters and Stanley Lowe of the American Judicature Society lend credence to the celebrated dictum of Chief Justice Vanderbilt that "Judicial reform is not a sport for the shortwinded."

Paul C. Reardon, Associate Justice of the Commonwealth of Massachusetts, has suggested that even Vanderbilt and Pound were unhappy by the glacial speed of reform. Reardon quotes Pound as saying, shortly before his death, that his 1906 address "was a good speech, there has been a lot of talk about it, but nothing much has happened." He

mands upon existing judicial resources have burgeoned, and it has been said that the "old ways of doing things are clearly inadequate to meet the burdens imposed on our courts by the 'law explosion' of the mid-20th century."[5] The legitimacy of these demands already has been recognized in Washington. Partial reform of the courts of limited jurisdiction was accomplished in 1961,[6] and a court of appeals was created in 1969.[7] Since no one assumed those two steps alone would resolve all the problems presented, Washington became an active participant in the National Center for State Courts when it was organized.[8] The state also has been aided twice by the citizen conference series sponsored in part by the American Judicature Society.[9] It was during the second of these two conferences that S.J.R. 113,[10] the proposal to place a new judicial article in the state constitution, was developed. The purpose of this article is to discuss some of the provisions of that proposal.

For many persons, "judicial reform" has become virtually synonymous with "selection and tenure of judges."[11] However, there are other issues, perhaps equally important. At least four such issues merit spe-

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also suggests that Vanderbilt, if alive, might now say: "Please cease quoting me relative to . . . the shortwinded and use the wind you save in action." Reardon, *The New National Center for State Courts—Progress and Prospects*, 55 JUDICATURE 66 (1971).

5. 27TH AMERICAN ASSEMBLY, FINAL REPORT: THE COURTS, THE PUBLIC AND THE LAW EXPLOSION (1965).

6. WASH. REV. CODE §§ 3.30.010-.090 (Supp. 1972), entitled "Justice Courts and Other Inferior Courts—1961 Act."

7. WASH. CONST. amend. 50. The implementing legislation was enacted in 1969, WASH. REV. CODE ch. 2.06 (Supp. 1972), and the court began hearing cases on Sept. 8, 1969. *See* note 16 *infra*.

8. Judge Morell Sharp, U.S. District Court, while still a Justice of the Supreme Court of Washington, was one of the six incorporators of the National Center. Judge Sharp has been and still is a thoughtful contributor to the dialogue concerning judicial reform.

9. The American Judicature Society was one of the joint sponsors of the Citizens' Conference on Washington Courts, Seattle, Nov. 10-12, 1966, which provided impetus for the Court of Appeals amendment, and of the Citizens' Conference on Washington Courts II, Issaquah, June 15-17, 1972.

10. S.J. Res. 113, 43d Wash. Legis., Reg. Sess. (1973) [hereinafter referred to as S.J.R. 113].

11. Professor Maurice Rosenberg, for example, says that even in the best of courts, "the key factor is still the judge. . . . Even in a government of laws, men make the decisions." Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 TEX. L. REV. 1063 (1966). He cites Ehrlich, *Freedom of Decision*, in 9 MODERN LEGAL PHILOSOPHY SERIES 65 (1917) for the proposition that "there is no guarantee of justice except the personality of the judge," and Leflar, *The Quality of Judges*, 35 IND. L.J. 289, 305 (1960) for the statement: "The quality of our judges is the quality of our justice . . . ." The bibliography on the topic of judicial selection is extensive. Justice Robert Utter has added a helpful evaluation of some of the possible variations in this issue of the *Washington Law Review*.

cial attention and can be discussed in connection with specific provisions of the proposal. The topics and the references in S.J.R. 113 are as follows:

Section 1. "The judicial power . . . shall be vested in a unified court system . . . ."

Section 1(7). "The legislature shall provide for the funding of the operation of the courts."

Section 14(2). "Any justice or judge may be suspended, removed, or otherwise disciplined . . . ."

Section 17. "The management and administration of the courts shall be vested in the supreme court . . . ."

I. A UNIFIED COURT

Section 1(1) of the proposed judicial article is entitled "Unified Court System." In its present form, the section provides for "an administratively unified" court and designates the components of such system.[12] What would the adoption of such a constitutional provision mean?

Article IV, section 1 of the Washington Constitution provides that "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." The section was not intended to create a unified court, and, as will soon be apparent, no such system exists.

As adopted in 1889, the Washington State Constitution provided for a supreme court of five judges, and authorized the legislature to increase the number of judges and to create departments. The membership was increased to seven in 1901 and to nine in 1909.[13] The legislature also authorized the court to sit in two departments, each department consisting of four judges and the chief justice.[14] The

12. As first introduced, section 1 of S.J.R. 113 was:

JUDICIAL SYSTEM. (1) Unified Court System. The judicial power of the state shall be vested in a unified court system which shall be divided into one supreme court, a court of appeals, a superior court, a district court, and other courts established by statute. A single-level trial court embracing the superior court and the district court may be provided by statute.

During the session, a substitute resolution was developed. In this form the phrase "a unified court system" was expanded to "an administratively unified court system." The amendment appears to have been an attempt to still the debate over the "single trial court" issue. *See* note 30 and accompanying text *infra*.

13. WASH. REV. CODE § 2.04.070 (1959).

14. WASH. REV. CODE § 2.04.120 (1959).

thirty-eighth amendment to the constitution, adopted in 1962, authorized the use of judges *pro tempore*.[15] The same amendment authorized superior court judges to sit in any county of the state. When another constitutional amendment was adopted in 1968 to create a court of appeals,[16] some consideration was given to reducing the number of supreme court judges, but no action was taken. Section 2(1) of the current proposal would authorize a supreme court of "not less than five nor more than nine [justices] as may be provided by statute."[17]

The supreme court originally had almost unlimited appellate jurisdiction and original jurisdiction for named writs. The establishment of the court of appeals transferred the appellate load to that court, save for five categories of cases which are to be directly appealed to the supreme court.[18] The court of appeals has three divisions, the headquarters of which are in Seattle, Tacoma, and Spokane. Division I (Seattle) has two panels; the other divisions have one panel each. The panels are composed of three judges. For election purposes, the divisions are divided into nine districts. Pursuant to Court of Appeals Administrative Rule 8, the judge on each panel who has the shortest term to serve and who does not hold office by appointment or by election to fill a vacancy is chief judge. This rule is parallel to the consti-

15. Either retired judges or superior court judges could be used for this purpose.

16. WASH. CONST. art. 4 was amended by amendment 50, approved November 5, 1968, as follows:

> Art. 4, § 30. COURT OF APPEALS. (1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.
>
> (2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.
>
> (3) Review of superior court. Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.
>
> (4) Judges. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.
>
> (5) Administration and procedure. The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court.
>
> (6) Conflicts. The provisions of this section shall supersede any conflicting provisions in prior sections of this article.

17. Adoption of this proposal would give the state a limitation on the *maximum* number of judges for the first time. Perhaps concern over supreme court "packing" was not a worry until the early decades of this century.

18. The implementing legislation defining jurisdictional boundaries is WASH. REV. CODE § 2.06.030 (Supp. 1972). The issues going directly to the supreme court involve (1) court orders directed to state officers; (2) alleged unconstitutionality of statutes or ordinances; (3) death penalties; (4) "fundamental and urgent issues of broad public import"; and (5) conflicting decisions among the court of appeals panels or decisions of the supreme court.

tutional provision presently governing selection of the chief justice of the supreme court.[19] The rule is designed, it would seem, to assist in the re-election of the judge next to stand for election and, precisely by virtue of that fact, almost guarantees that the chief judge will be uninterested in experiments, innovations, or decisions which cause undue public commotion.

The trial court of general jurisdiction[20] is the superior court. It is a court of record[21] with original jurisdiction in all cases in equity and in nearly all cases in law. The superior court also has appellate jurisdiction in a small number of instances, such as cases arising from courts of limited jurisdiction.[22] There are currently ninety-two superior court judges who sit in twenty-eight judicial districts. Eighteen districts are composed of a single county, nine districts cover two counties, and one district is made up of three counties.

In addition to the supreme court, court of appeals, and the superior court, the constitution provides for "justices of the peace and such other inferior courts as the legislature may provide."[23] The basic jurisdiction of justice courts is limited by the constitution, which author-

19. WASH. CONST. art. IV, § 3 provides, in this connection, that:

> The judge having the shortest term to serve not holding his office by appointment or election to fill a vacancy, shall be the chief justice, . . . and in case there shall be two judges having in like manner the same short term, the other judges of the supreme court shall determine which of them shall be chief justice.

20. The term "general jurisdiction" is used to distinguish these courts from those which are designated as "courts of limited jurisdiction." The power of the latter courts is limited in terms of issues, dollar value, and geographical area. Except for small criminal and civil matters which may be handled by courts of limited jurisdiction, and the very few cases in which the supreme court has original jurisdiction, the superior courts serve as the trial courts for all proceedings.

21. The term "court of record" means that a record of the trial is preserved and an appeal can be taken "on the record" without having witnesses appear to testify or otherwise produce evidence. Where no record is kept, as is true of all courts of limited jurisdiction, review must be de novo—the entire matter must be tried as if the trial were "new."

22. This review, if it may be properly so called, is the de novo trial described in note 21 *supra*. It is often contended that "de novo" trials are unreasonably wasteful because of the duplication required. To evaluate this contention one must at least know the cost of making records at the trial level for all cases and the cost of hearing the cases which are now heard de novo. Such data is not available. It is known that a notice of appeal is entered in only 3.3% of the cases actually tried (not the cases filed) by the district courts and justices of the peace and in 4.7% of the cases tried by municipal courts. How many of these notices of appeal are abandoned is not known. Informed persons estimate that not more than 0.5% of the cases tried in courts of limited jurisdiction are in fact heard on appeal. Some statistics bearing on this problem may be found in ADMINISTRATOR FOR THE COURTS, 15TH ANNUAL REPORT, JUDICIAL ADMINISTRATION IN THE COURTS, STATE OF WASHINGTON 113, 139 (1971) [hereinafter cited as 1971 ADMINISTRATOR'S REPORT].

23. WASH. CONST. art. IV, § 1.

izes the legislature to establish the details governing the court's jurisdiction. A constitutional amendment in 1951[24] prohibited "fee justices" in cities of over 5,000 inhabitants. A further reduction in "fee" (unsalaried) justices occurred when the legislature enacted what is commonly known as the Justice Court Act of 1961.[25] Counties were not required to conform to the 1961 act, and, as of 1973, eight counties have not elected to do so. Accordingly, in those counties there are still judges whose salary depends upon the fees collected.[26] By the perverse customs of labels, what the 1961 statutes call "justices of the peace" commonly are known as "district court judges" who are organized into what is known, almost incredibly, as the Magistrates' Association. At last report there were sixty-two district courts, manned by eighty-five district court judges, and an additional forty-six justices of the peace in counties outside the 1961 act. Washington also has 235 municipal courts.[27]

The jurisdiction of each of the courts of limited jurisdiction is defined by statute[28] and is too complex to justify description here. For immediate purposes, it will suffice to state that the jurisdictions overlap and are haphazard. Prior to 1967, no one in Washington knew precisely how many courts of limited jurisdiction were operating or exactly what they were doing. A study financed by the legislature enabled the Administrator for the Courts to gather some data which revealed that, excluding municipal courts, 300,000 matters were filed in the courts of limited jurisdiction and nearly six million dollars in revenue was generated in 1968—figures which increased to over a third of a million filings and $7.3 million in revenue by 1971.[29]

24. WASH. CONST. amend. 28.

25. WASH. REV. CODE ch. 3.34 (Supp. 1972). The 1961 legislation requires that judges of courts governed by the act be lawyers. However, in counties not under the act and in municipal courts the judge need not be trained in the law. The 1971 Report of the Administrator for the Courts, *supra* note 22, states that there are 140 judges who are not lawyers.

26. The United States Supreme Court has twice held that judicial officers paid from fees they collect are not disinterested and that criminal convictions on cases heard by such judges are not sustainable. Ward v. Village of Monroeville, 409 U.S. 57 (1972), and Tumey v. Ohio, 273 U.S. 510 (1927). Despite factual variations, these decisions appear applicable to Washington fee judges.

27. 1971 ADMINISTRATOR'S REPORT at 21. In addition to the cities which have a municipal court, there are fifty-eight municipalities which contract with district courts for the enforcement of city ordinances.

28. WASH. REV. CODE tit. 3 (Supp. 1972).

29. 1971 ADMINISTRATOR'S REPORT at 113-14.

As the foregoing description indicates, the primary characteristic of the Washington judiciary is that it is *not* a unified system. Unfortunately, as pointed out by a speaker at the Citizens' Conference on Courts, "the unified court concept means different things to different people."[30] For many court reformers, the key aspect of unification is the single trial/single appeal notion. The idea is that all trial courts should be courts of record. An appeal would be on the record, not de novo, and would move directly to the court of appeals or supreme court. For practical purposes, courts of limited jurisdiction would be merged with the superior court. This concept has been vigorously discussed in Washington for some years by friends[31] and foes.[32] It is important to understand that a unified court system *may or may not* have a single trial/single appeal provision. S.J.R. 113 skirts the issue by providing, in section 1(1), that: "A single-level trial court embracing the superior court and the district court may be provided by statute for the entire state or a region therein.[33] This is a noble attempt to avoid "grasping the nettles." One is reminded that "the paradox of judicial reform lies in the contrast of its major promise, to remove politics from the courts, and the road to its achievement, political compromise."[34] Attitudes concerning the "single trial court problem" color nearly every discussion. It is especially interesting to notice that citizen groups strongly favor the single trial/single appeal concept.[35]

For analytical purposes, an attempt should be made to separate the "unified court" and "single trial court" issues. The concept of unification is a much broader problem. It is central to important considerations of administration and management, funding, discipline and

30. Address by Professor Rubin G. Cohn, *Court Organization and Administration,* Washington Citizens' Conference, June 16, 1972. Professor Cohn says that to him a unified court "means essentially a simplified court structure, functionally integrated and interrelated in each of its parts, over which there exists an effective centralized administrative authority."

31. Truax, *Courts of Limited Jurisdiction are Passé,* 53 JUDICATURE 326 (1970).

32. Sharp, *A Unified Trial Court?,* 24 WASH. ST. BAR NEWS 13 (No. 5, 1970).

33. As originally written the sentence ended with the word "statute." The concluding phrase, added in the substitute resolution, appears of little value, may be needlessly ambiguous, and must represent some political tactic.

34. B. COOK, THE PARADOX OF JUDICIAL REFORM: THE KANSAS EXPERIENCE (American Judicature Society Report No. 29, 1970).

35. Citizens' Comm. on Washington Courts, Conference Summary, point 3, June 17, 1972; Billington, *Our Courts are Good and Should Be Better: A Non-Lawyer's View,* 26 WASH. ST. BAR NEWS 10 (No. 8, 1972); Citizens' Study Comm. on Judicial Organization, Madison, Wisconsin 73 (1972).

tenure of judges, and utilization of judicial manpower. A number of earnest but not notably successful attempts have been made to introduce order into the Washington judicial system by administrative efforts. The supreme court, for example, does have rule-making power and has used it to achieve some procedural uniformity,[36] but the superior courts constitutionally are empowered to govern themselves by their own rules.[37] Rules have been promulgated for the supervision of courts of limited jurisdiction, but the means to implement such rules is lacking. Regularity and continuity have been sought through the organization of judicial conferences.[38] Although the problem of disunity has been recognized and attempts have been made to deal with it, no manageable system has emerged. A manageable system seems essential to judicial reform. Thus, in a sense, unification is a condition precedent to the other issues involved in S.J.R. 113.

II. FUNDING THE COURTS

Section 1(7) of S.J.R. 113 proposes that "the legislature shall provide for the funding of the operations of the courts." What are the implications of this proposal?

Historically the government has not borne the costs of private litigation, at least not beyond providing a building and sometimes a salaried judge.[39] Despite an annoying tendency to match a raise in judicial

36. The supreme court, with the assistance of the Judicial Council, has been diligent in amending and supplementing practice rules. Civil Rules for the Superior Court were adopted in 1967. Rules of Criminal Procedure were adopted in 1973, and Rules for Appeal are now being developed. The legislature authorized the supreme court to issue rules governing courts of limited jurisdiction in 1925, WASH. REV. CODE § 2.04.190 (1959), and in 1961, WASH. REV. CODE § 3.30.080 (Supp. 1972). In 1963 the Rules for Courts of Limited Jurisdiction (divided into administration, civil, criminal, and traffic rules) were issued and distributed to each court of limited jurisdiction. The rule-making power has helped, but structural and organizational reform cannot be accomplished by this process alone.

37. WASH. CONST. art. IV, § 24.

38. WASH. REV. CODE § 2.56.060 (Supp. 1972), part of the legislation creating the office of Administrator for the Courts, authorizes an annual conference of judges. These conferences are attended by the judges of the appellate and the superior courts. The meeting is normally held at the same time and in the same locality as the annual Washington State Bar Association meeting. WASH. REV. CODE ch. 2.16 (Supp. 1972) provides for an association of superior court judges. These judges are organized and hold annual meetings. WASH. REV. CODE ch. 3.70 (Supp. 1972), enacted in 1961, along with the Justice Court Act, establishes a State Magistrates' Association which also meets annually. Note that no one of these groups includes the whole judiciary.

39. Comment, *Kansas Court Costs: The Quality of Mercy is Strained,* 9 WASHBURN L. J. 87 (1969).

salaries with an increase in filing fees and to pay for law library costs out of charges imposed upon litigants, there probably has been a gradual trend toward paying a greater percentage of the total justice system expenses with public funds. Whether such a trend actually is occurring or not, it would seem proper to support the judiciary almost totally with tax funds—more specifically, with state funds, since we regard our judicial system, except for the municipal courts, as a part of our state system of government. Somewhat strangely, however, we have not put the financial burden of the judiciary at the state level as we have the other two equal branches of government—the executive and legislative. Is there any more reason for a judge of the superior court to receive half his salary from county funds than for a legislator or an official of the executive branch to be so compensated? The issue is more than a philosophical one for the simple reason that no form of management is more effective than that based upon control of the budget.

In a Conference Summary issued by the Citizens' Committee on Washington Courts, it is stated that a "most significant need is to provide adequate appropriated funds for the operation of the entire judicial system from state rather than local government sources."[40] May one assume that the above quoted language of S.J.R. 113 was intended to require financing of the judicial system from state funds? This would be a major shift in Washington, for state funding of the courts clearly has not been our pattern. Money appropriated by the state legislature presently pays only the salaries of the appellate court judges, half the salary of the superior court judges, and a few other expenses.[41] The balance of funds used to finance the courts and court related activities comes from county and municipal allocations.

All of the truisms relating to "control of the purse strings" apply to courts in the same manner as they do to other activities. An independent judiciary, free of political influence, is not helped when

40. Citizens' Comm. on Washington Courts, 1972 Conference Summary, point 5, at 3.

41. Judicial agencies for which the legislature appropriates money are the supreme court, court of appeals, state law library, office of the Administrator for the Courts, and Judicial Council. State funds also are appropriated to pay one-half the salaries of superior court judges (plus benefits) and for the state contribution to the judicial retirement funds. Total appropriations for the judiciary for the 1973-75 biennium are $9,949,503 (Ch. 137 [1973] Wash. Laws, 1st Ex. Sess.). In addition the state pays about one-tenth of the cost of adult and juvenile probation services. The total paid by the state in 1971 was $1,369,098.

judges must appear hat-in-hand before county commissioners. The judge's position is awkward enough simply because he must stand for election in the county, and the fact that some of the commissioners may be litigants before the judge increases the ethical problem. Indeed, when one recognizes that a lawyer-commissioner may hear the judge's request for funds one day and argue before the judge the next, it is difficult to avoid characterizing the situation as a conflict of interests.

Fortunately, since most judicial salaries are established at statewide levels (except for municipal judges and unsalaried justices of the peace concerning whom more will be said later), most judges are spared the need to lobby that question before local boards.[42] The same happy circumstance does not pertain to appropriations for facilities and staff. Some variation in local funding is inescapable, and perhaps this alone is not greatly detrimental. The greater danger lies in the probability that local funds will not be adequate. While counties obtain money principally from property taxes—a regressive and undesirable method at best—and have nearly reached the limits of that avenue of income, the cost of judicial operation continues to increase.[43] The resulting squeeze for dollars and the importance of funding other local services such as schools stimulate demands for the courts to pay their own way. The consequence of such fiscal pressure is the development of a new "fee justice" system of courts.[44] District and municipal courts are

42. The salary of superior court judges and full-time justice court judges are fixed by statute and are uniform throughout the state. Ch. 137 [1973] Wash. Laws, 1st Ex. Sess., set the salary for superior court judges at $32,000, justice court judges in counties governed by the 1961 Justice Court Act, at $26,000, and justice court judges in counties not under the 1961 act, at $18,000. The legislature sets a range for the salaries of part-time judges of courts of limited jurisdiction. (*See* WASH. REV. CODE §§ 3.16.002, 3.58.020, 35.20.160, 35.22.420, 35.23.220, 35.24.450, and 35.27.520 (1959)). The county commissioners, city council, or mayor choose the salary within the range to be paid to the judge. In 1971, of 115 part-time judges surveyed, six were paid out of fees and the rest received salaries ranging from $120 to $13,000 per year. The median salary was $1800 per year, and the average (not including those paid out of fees) was $2681.46. WJC STUDY.

43. Expenditures for justice courts (excluding municipal courts) increased 34% from 1969 to 1971. WASH. LEGIS. TRANSP. COMM. ALTERNATIVE COMPUTATIONS FOR DETERMINING THE FISCAL IMPACT OF HB 645 on JUSTICE COURT REVENUES (1971).

44. While costs were rising, revenue from the justice courts was dropping. Revenue decreased 12% in the years 1969-1971. Despite this "adverse" shift, there was each year some net percentage of court revenue remaining after expenses were deducted. This "profit" is distributed in proportions prescribed by statute to state, county, and city funds. Amounts available for such distribution were 3.44 million dollars in 1969, 2.81 million in 1970, and 1.45 million in 1971. This is a 58% reduction in net revenue during the three years. *Id.*

expected to pay their way,[45] and it seems likely that in some communities court revenue is looked to as a significant source of income.[46] Pressure to obtain so-called bail forfeitures in traffic cases and to secure convictions which produce fines in other cases is inevitable. Judges sometimes receive worried messages from county fiscal personnel when receipts sag,[47] and planners are pressed for recommendations to generate more revenue through the courts.[48] Impact upon the quality of justice is unavoidable.[49] The practices here described pose the question of whether one may distinguish valid revenue generation from an unconstitutional form of tax gathering.[50] Justice, after all, is not supposed to be for sale.

Regrettably, Washington has not yet freed itself from fee justices in the traditional sense.[51] Unsalaried justices of the peace are recognized by our state constitution. Article IV, section 13 prohibits the receipt of

45. The following statement appears in KING COUNTY AUDITOR, REVIEW OF DISTRICT JUSTICE COURT OPERATIONS 7 (April 19, 1971):

> Of fundamental concern to the county is the recovery of the full cost of operating the District Justice Court system. One disadvantage of the present system is that the operation of the district courts can be used as a county-subsidized legal facility for cities in the county. . . . A second weakness of the present system is the inability to recover other than direct budget expenditures from the Justice Court Expense Fund.

46. The WJC STUDY surveyed 151 municipal and justice (including justice of the peace) courts for 1971 expenses. Comparing expenses to income (including traffic penalties) shown in the 1971 Report of the Administrator for the Courts, it appears that only nine of these courts had expenses greater than income. The rest produced a surplus of income ranging from a few dollars over expenses to $465,000 more than expenses.

47. Correspondence on file in author's office, University of Washington School of Law.

48. A 1972 study of the Seattle District Court states that: "If all the recommendations are implemented, the Seattle Court can operate on a *'break-even' basis, rather than at its anticipated annual deficit of $100,000.*" The first recommendation is: "Request the legislature to increase the basic civil filing fee from $6.00 to $14.00, and charge an additional fee of $10.00 for garnishment actions. Also increase the small claims filing fee from $1.00 to $5.00." SEATTLE DIST. CT. KING CO. WASH., A MANAGEMENT AUDIT BY THE OFFICE OF COUNTY AUDITOR (May 12, 1972).

49. By ch. 10 [1973] Wash. Laws, 1st Ex. Sess., the legislature authorized counties to deduct the cost of providing counsel for indigent defendants from the justice court current expense fund. Argersinger v. Hamlin, 407 U.S. 25 (1972), held that, absent waiver, a defendant could not be imprisoned for a misdemeanor or other petty offense unless represented by counsel. The fiscal impact of that decision has not yet been determined. It remains to be seen what share of justice court revenue will be required for this purpose.

50. *See* Saari, *Open Doors to Justice—An Overview of Financing Justice in America,* 50 JUDICATURE 296 (1967). Saari discusses cases which have held some court fees invalid, *id.* at 297.

51. The WJC STUDY discovered six fee justices among 115 justices interviewed. *See* note 42 *supra.*

fees "to his own use" by judicial officers *except* unsalaried justices of the peace. The 1961 Justice Court Act provides for salaries, but, as noted earlier, not all counties have been brought under that act. It seems certain that the decisions of such fee justices could be overturned,[52] but for most litigants the expense of such constitutional vindication would make the victory Pyrrhic.

This disorganized and undesirable method of funding courts cannot continue. Difficulties are by no means limited to obtaining allocations for the operation of the courts: the inherent difficulty of transmitting and accounting for funds collected under the existing scattered operation poses equally burdensome problems.[53] At least one study indicates that this source of funding may soon be inadequate in any event.[54] In addition, reliance upon local funding to maintain Washington's judicial system may require some localities to pay a disproportionately high share of the total costs of the court system. For example, the presence of a penal institution in a county will produce an abnormally large volume of writs for the superior court to hear. The current pattern of funding also requires Thurston County,[55] site of the state capitol, to pay the costs related to litigation involving claims against state officers and kindred matters. Further, the financial burden of domestic relations cases is borne largely by the urban trial courts to which such cases are often moved from rural courts. Complaints received by

52. *See* note 26 *supra.*

53. King County v. United Pac. Ins. Co., 72 Wn. 2d 604, 434 P.2d 554 (1967) involved a shortage between revenue received by a district court and the amount transmitted by the court to the county. The supreme court decided that the judge could be held personally accountable whether the shortage resulted from his own acts or the acts of the clerks and deputies working under his supervision. The decision has obvious implications for judges and their bonding companies. It has been argued that many lawyers otherwise willing to serve as justices will be deterred from such service by the economic risk imposed. Study of this problem by the Judicial Council resulted in proposed legislation to provide some protection for the judge. The bill (H.B. 425) was not enacted during the 1973 regular and first extraordinary session. Embezzlement remains a possibility under any system, but the situation can be improved. Fines, fees, alimony, support payments and other monies which come into the court are far too extensive to be handled as if they were small change in the sugar bowl. A unified court system would bring some order to this fiscal function in Washington as it has done in other states. For a description of a state system which is said to work well, see the section entitled *Fiscal Management* in CHIEF JUSTICE OF THE COLORADO SUPREME COURT, ANNUAL REPORT, THE STATE OF THE COURTS 3 (1972).

54. *See* ALTERNATIVE COMPUTATIONS FOR DETERMINING THE FISCAL IMPACT OF HB 645 ON JUSTICE COURT REVENUES, *supra* note 43.

55. *But see* ch. 44 [1973] Wash. Sess. Laws, *amending* WASH. REV. CODE § 4.92.010 (Supp. 1972). The statute as amended allows any plaintiff to sue the state or a state official in any county according to the normal rules governing venue.

the Judicial Council indicate that numerous venue changes result in shifting costs from a county of residence to another county which has no special relation to the parties or to the litigation.[56] Changes in venue for lengthy and expensive litigation, such as that involved in *State v. O'Connell*,[57] impose an impossible financial load on a small county and require the appellate court to be imaginative beyond reasonable expection in fashioning relief.

State funding is a rather obvious solution to most of these difficulties, and, as stated earlier, the Citizens' Conference Report favored such central funding. However, if section 1(7) was intended to require that result, it was not so understood by the legislature. In fact, concern was expressed in senate hearings that the clause might be so interpreted, and the Judiciary Committee proposed an amendment which would require only that the legislature "provide *the method* of funding the operations of the courts."[58] There are a few jurisdictions in which court funding is done totally, or almost totally, at the state level, and a trend in that direction appears to be underway.[59] Nevertheless, it would be impractical to expect an abrupt change from one funding system to the other. Wisconsin is considering what could well be an appropriate transitional process. A citizens' report in that state recommended: "State assumption of . . . financing . . . on a gradual basis over a period of years [beginning with] . . . judicial or support employees salaries, . . . to supplies and services, and finally . . . for courtroom facilities."[60]

56. WJC STUDY. During 1972 an attempt was made by the Administrator for the Courts and by the Judicial Council staff to obtain data showing what costs are imposed upon counties to which cases are transferred. It was learned that records are not kept which disclose such information, but several counties assert that the amount is substantial. A Judicial Council committee has been instructed to gather the best information available and to develop legislation responsive to whatever need can be identified.

57. State v. O'Connell is an order of the supreme court, No. 42041, dated October 1, 1971. Because it is only an order, not a decision, it does not appear in the Reports. The problem before the court was how to protect Clark County from the "extreme financial hardship" caused by change of venue from King County. Five justices decided that there were "no statutes directly in point" and that the court had inherent power to allocate costs. Four justices, dissenting, felt that the state constitution and relevant legislation forbade such allocation.

58. *Hearings on Substitute S.J. Res. 113 Before the Senate Judiciary Comm.*, 43d Wash. Legis., 1st Ex. Sess., 1973.

59. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS REPORT, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM (1971).

60. Citizens' Study Comm. on Judicial Organization, *supra* note 35.

For the reasons mentioned above, it seems predictable that state financing of the judiciary will not be long delayed. It is thought and has been held that courts have inherent power to compel state and local governments to furnish funds reasonably necessary for court functions.[61] Such an application of judicial power may be proper in an extreme case but, as Justice Brennan has pointed out, is also "to a certain extent illusory for, ultimately, sovereignty is not divisible."[62]

The more challenging question is how to do the job well. Who will develop the budget? How will it be presented and justified? Will the executive have power of review? Who will interpret fiscal needs to the legislature? These questions will be deferred until the discussion of management and administration.

III. JUDICIAL DISCIPLINE AND REMOVAL

While this paper was being written the newspapers reported that "The State Superior Court Judges today unanimously approved a Code of Judicial Conduct aimed at policing themselves before someone else decides to do it."[63] The action of the judges had been heralded by their legislative spokesman.[64] The interest of the judges in the issue of judicial discipline was neither new nor entirely spontaneous, as members of the Bar and of the public had been calling for change for several years. During 1972 some lawyers urged that the essentially benign lawyers' preference poll, a sort of guide to voters concerning judicial performance, should be transformed into a full-blown evaluation of judges. Nearly half of the lawyers in the state returned a questionnaire and expressed opinions about the issue of judicial performance and discipline. Some results were made public.[65]

61. Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 274 A.2d 193 (1971). *See* Carrigan, *Inherent Powers and Finance,* 7 TRIAL 22 (No. 6, 1971).

62. Brennan, *Judicial Fiscal Independence,* 23 U. FLA. L. REV. 277, 281 (1971).

63. Seattle Times, Apr. 20, 1973, § A, at 7.

64. Judge William L. Brown, appearing before Senate Judiciary Committee on S.J.R. 113 on March 21, 1973, mentioned a voluntary disciplinary proposal under consideration by the Superior Court Judges' Association. The adoption culminated work begun in 1969, described in a two-part article, *Judicial Ethics,* 24 WASH. ST. BAR NEWS 7 (No. 2, 1970) and 24 WASH. ST. BAR NEWS 7 (No. 3, 1970).

65. *WSBA Board Disseminates Data on Rating of Judges,* 26 WASH. ST. BAR NEWS 16 (No. 3, 1972). It had been decided earlier that the poll was "not intended as a political or punitive measure for general public release." 25 WASH. ST. BAR NEWS 13 (No. 11, 1971).

When asked if they were satisfied with the "present system of judicial discipline," sixty-five percent of the lawyers replied no. Some made comments such as "What present system?" and "I didn't know there was a present system." Clearly it is time for action.

Peer review must not be underestimated as a method of judicial control. Nor should its efficacy be overestimated, especially in the absence of a unified court system. Judges who answer only to an electorate have little reason to correct each other's shortcomings. A code of ethics is commendable, but, as put editorially a few years ago, the public "expects far more than it has received thus far in the judges' own attempts at self-regulation."[66]

Although the disciplining of judges is a difficult and sensitive matter, Washington has available only the standard, traditional processes. The existing Canons of Judicial Ethics[67] are regarded by many as little more than pious platitudes. The constitution does provide that "the legislature may by general law . . . require the retirement of judges for physical or mental disability, or any cause rendering judges incapable of performing their judicial duties."[68] It also provides for removal of a "judge of any court of record" for reason of "incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause," but only by a joint resolution of the legislature in which three-fourths of the members concur.[69] One is hardly over-taxed to show that this mixture of sanctionless exhortation, largely unexercised statutory retirement power for incapacity, and impossibly cumbersome removal authority for malfeasance is unsatisfactory. For example, removal of a judge by three-quarters vote of the legislature is, in the words of Jack E. Frankel, "almost fanciful."[70] Even if legislative attention could be attracted to such an undertaking, the process is too long, too difficult, and much too political.[71]

66. *Editorial,* Seattle Times, Dec. 9, 1969.

67. WASH. R. GEN. APPLIC., CANONS OF JUDICIAL ETHICS 1-36.

68. WASH. CONST. art. IV, § 3(a). At present, a judge also may voluntarily retire if "physically or otherwise permanently incapacitated for the full and efficient performance of the duties of his office," if he has served for ten years and can prove the incapacity. WASH. REV. CODE § 2.12.020 (Supp. 1972). Obviously this is not the same as being removed.

69. WASH. CONST. art. IV, § 9.

70. Frankel, *Judicial Discipline and Removal,* 44 TEX. L. REV. 1117, 1119 (1966). Mr. Frankel is executive secretary of the Commission on Judicial Qualifications of the State of California.

71. For an interesting account of a famous case, *see* Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase,* 48 JUDICATURE 183 (1965).

Nor is it easy to select a disciplinary system which is fair to the judge. He is not in a position to defend himself by public debate and, if charged with impropriety or incompetence at the time of an election, he can be harmed in a way which may be quite unwarranted. For reasons such as this, it is often suggested that discipline should be administered within the judiciary.[72] The dangers are real enough so that any meaningful disciplinary system probably cannot be implemented without court unification and changes in the judicial selection process.[73] Available processes do not fit the usual discipline case in which more than a reprimand for unethical conduct but less than removal from the system is indicated. To offer only Canons of Ethics or mandatory retirement is to misunderstand the nature of the problem.[74]

There are, of course, other possibilities for discipline. It is provided by statute that judges of courts which are not courts of record and therefore not within the constitutional provision mentioned above forfeit their office by commission of a felony.[75] This statutory forfeiture was asserted in the case of *State ex rel. Carroll v. Simmons*,[76] in which Judge Simmons was convicted of a felony by the superior court but, by obtaining a reversal of the felony conviction, avoided forfeiture of his office. In the process, however, he demonstrated that disbarment is another way in which a judge of a court *not of record* can lose his office.[77] However, disbarment poses no threat to justices of the peace who need not be lawyers to hold office;[78] and even if the threat of felony conviction and disbarment reached all judges, the process would be unduly disruptive. Judge Simmons made this point

72. *See* Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117, 1120 n.6 (1966), *citing* Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUD. SOC'Y 113 (1928), and Simpson, *Federal Impeachment*, 64 U. PA. L. REV. 651, 803 (1916).

73. *See* Cook, *The Politics of Piecemeal Reform of Kansas Courts*, 53 JUDICATURE 274 (1970). "Judges are unlikely to accept surveillance and insecurity without the benefits of tenure and the esprit de corps of a single unified court." *Id.* at 280.

74. *The National Conference on Judicial Selection & Court Administration*, 43 J. AM. JUD. SOC'Y 114 (1959):

> The most urgent need is for methods to deal with judicial conduct of a nature not warranting or requiring removal. . . .
>
> Provision should be made for the initiation and investigation of complaints before presentment of formal charges, and precaution should be taken for the protection of all persons involved.

75. WASH. REV. CODE § 9.92.120 (1959).

76. 61 Wn. 2d 146, 377 P.2d 421 (1962).

77. *In re* Simmons, 65 Wn. 2d 88, 395 P.2d 1013 (1964).

78. *See* note 25 *supra*.

by dismissing cases for want of prosecution after his records and clerical support were removed and the corporation counsel declined to appear before him, while the city struggled with writs of *quo warranto,* bench warrants and temporary injunctions. Even then the case lacked the drama which some disciplinary proceedings have had. The infamous 1962 "warrant war" in California, for example, featured two justices who issued nearly fifty warrants of arrests against public officials before they finally were suspended from office.[79]

The Washington Court of Appeals recently reversed and remanded a criminal conviction because circumstances created the appearance that the trial judge might have an interest in the matter, commenting that: "The appearance of bias or prejudice can be as damaging to public confidence . . . as would be the actual presence of bias or prejudice."[80] Yet when the headlines of a local paper flatly charge a judge with conflict of interest,[81] or when a judge is accused of racial bias and physical abuse of a petitioner,[82] no process exists to rehabilitate public confidence by either vindicating the judge if he has been maligned, or taking appropriate action if he has been properly accused.

Section 14(2) of S.J.R. 113 would apply to all of these problems. The subsection provides:

79. *In re* Tindall, 60 Cal. 2d 469, 386 P.2d 473 (1963).

80. State v. Mandry, 8 Wn. App. 61, 504 P.2d 1156 (1972). It may be argued that reversal of a criminal conviction for "appearance" of judicial bias is a rather expensive method of protecting the judicial image, assuming incontrovertible proof of the defendant's guilt existed. Even worse, one wonders if such reversals have any corrective effect upon questionable judicial conduct. In the case of Podlaskey v. Price, 87 Cal. App. 2d 151, 168, 196 P.2d 608, 618 (1948), the court reversed a decision for improper conduct of a judge and observed that: "Similar behavior by Judge Burnell has been the subject of many reversals during the past 24 years . . . without effecting a reform in his behavior . . . ." A concurring opinion suggested that the judge might be found mentally incompetent or be removed by "a concurrent resolution of both Houses of the Legislature adopted by a two-thirds vote of each House." California now has a disciplinary process capable of preventing such a "public scandal," but Washington is today almost exactly where California was in 1948.

81. *Conflict of Interest? Hamilton sits as judge over long-time client.* Headlines, Wenatchee Daily World, Jan. 7, 1973, at 1. The news account asserted that the judge was "not only a long-time friend and former neighbor . . . but also had been [the defendant's] attorney on other cases in different courts over the past nearly 20 years."

82. A Chicano woman alleged that she asked a non-lawyer justice of the peace for assistance in stopping other persons from harassing her and that the justice replied with racially-oriented comment and by shoving or kicking her off a porch. These allegations, after investigation by the State Board Against Discrimination, were reported to the Attorney General, supreme court, Judicial Council and Magistrates' Association. The general conclusion reached apparently was that none of these agencies had authority to

> Any justice or judge may be suspended, removed, or otherwise disciplined by the Judicial Qualification and Districting Commission for misconduct in office which may be defined by statute or by rule authorized by statute, or for wilful and persistent failure to perform his duties.

"Procedures would be established," said the chairman of the Citizens' Committee on Washington Courts in writing about the proposed Commission, "whereby judges who were neglectful of their responsibilities, either from personal habit or direct disregard, could be disciplined or removed."[83] The virtues claimed for a disciplinary system administered by a commission are its universality, capacity for prompt action, and the opportunity to tailor the response to the need of each case.

Creation of a disciplinary commission would not constitute rash or pioneering action. Over a decade of well documented experience is available in the reports of other states.[84] The model for such commissions, used now in approximately half the states, is that of California. The annual reports of that commission indicate a modest but steady flow of activity. A chart most conveniently illustrates the experience of the two most recent years:[85]

YEAR	TOTAL NO. OF JUDGES	COMPLAINTS FILED	CASES INVESTIGATED IN DETAIL	CONTACT OF JUDGE BY COMMISSION
1971	1087	217	54	42
1972	1115	213	64	49

It will be observed that most complaints are resolved without detailed investigation. When detailed investigation indicated reason to do so, communication with the judge was undertaken. By this process the difficulty was disclosed and either satisfactorily explained or alleviated by suggestions for improvement and correction of judicial conduct. In

intervene. *Procedure for Complaints Against Judges of Courts of Limited Jurisdiction*, Judicial Council Docket 67-4-6.

83. Billington, *Our Courts Are Good and Should Be Better: A Non-Lawyer's View*, 26 WASH. ST. BAR NEWS 10 (No. 8, 1972).

84. An extensive bibliography, available in pamphlet form, entitled PUBLICATIONS AVAILABLE FROM THE AMERICAN JUDICATURE SOCIETY (1972), lists a number of reports concerning disciplinary commissions for anyone interested in details.

85. 1971 AND 1972 REPORT OF THE [CALIF.] COMMISSION ON JUDICIAL QUALIFICATIONS TO THE GOVERNOR. Obtained from Jack E. Frankel, Executive Officer of the Commission.

each of the years mentioned two judges retired voluntarily while the investigation was in progress. In only one instance was a formal hearing completed. That case resulted in a recommendation that the supreme court remove the judge from office.

Colorado also has a Judicial Qualifications Commission.[86] From April 1967 to March 1973 the commission met thirty-two times, received eighty-seven complaints, dismissed about half that number as frivolous, and investigated the remainder. Its activities since 1967 have resulted in the retirement or resignation of nine judges and public censure of another nine.[87] More significant than the removals and censure actions, however, is the fact that the system works well with minimum notoriety. The Colorado Report states that:[88]

> Usually, an informal hearing followed by letter from the Commission is sufficient to eliminate the judicial behavior complained of or to have a judge resign or retire voluntarily without requiring a formal hearing and subsequent review by the Supreme Court.

Nothing indicates that Washington has an unusual problem in maintaining a good judiciary. Indeed the contrary can be asserted with reason.[89] Still problems have and will arise, and when two-thirds of the lawyers responding to a survey are unsatisfied with judicial discipline and eighty percent of those unsatisfied believe a discipline commission is desirable, the proposal merits attention.[90]

IV. MANAGEMENT AND ADMINISTRATION OF THE COURTS

Any system, judicial or otherwise, needs management and administration. Yet, because of an assortment of historical reasons and because of a fear of loss of independence, judges have resisted being "administered." It is said that:[91]

86. COLO. CONST. art. VI, § 23(3).
87. ANNUAL REPORT OF THE CHIEF JUSTICE OF THE COLORADO SUPREME COURT, THE STATE OF THE COURTS 17 (1972).
88. *Id.*
89. Billington, *supra* note 83.
90. 26 WASH. ST. BAR NEWS 16 (No. 3, 1972), *supra* note 65.
91. Address by Lester Cingcade, *Non-Judicial Personnel and Court Financing*, Citizens' Conference on Washington Courts, June 16, 1972.

> The judiciary in most states has become a non-system tied together at best by court rules that purport to create some uniformity of operation. What in fact exists are semi-autonomous operations with little concern for the system at large.

Another authority says the administrative pinch exists because: "No one is really in charge. . . . No one has the responsibility and authority to see that the judicial department is operated efficiently for the people."[92] For Washington, that shoe fits, despite efforts to develop an effective administrative system. The most notable legislative efforts have been the creation of a Judicial Council in 1925[93] and the creation of the office of Administrator for the Courts in 1957.[94] Both of these are good beginnings; neither has been developed to anything approaching full utility. Progress also has been made by chief justices who have, by exhortation and cajoling, elicited varying degrees of cooperation. Nevertheless, the chief justice does not deal from a position of strength, for his only express constitutional authority is to "preside at all sessions of the supreme court."[95]

It has already been shown that Washington's courts are not unified in any meaningful sense. We have observed the adverse consequences of this lack of unification upon the functions of finance and discipline, but we have deferred until now the problems of management: how to achieve greater efficiency, how to arrange adequate administrative support, and how best to utilize judicial manpower.

There is room for debate as to what "efficiency" means when courts are under discussion. One writer says that "Justice includes both speed and fairness; it combines swift, efficient adjudication with a policy of preserving due process . . ." and then, two pages later, observes that "[d]ue process is inefficient, deliberately so."[96] The author of the foregoing statements is of course playing with the word "efficiency." Nonetheless, we may be forced to decide whether to opt for volume and speed because justice delayed is justice denied, or to "brook no tampering with quality; [and handle lawsuits] lovingly and with care

92. *Better Management of the Judicial System*, 5 TRIAL JUDGES' J. 1,3 (Jan. 1966).
93. WASH. REV. CODE ch. 2.52 (Supp. 1972). Justice Robert C. Finley described the operation of the Judicial Councils in *The Bare Bones of Court Reform*, 13 ST. LOUIS U.L.J. 171 (1968).
94. WASH. REV. CODE ch. 2.56 (Supp. 1972).
95. WASH. CONST. art. IV, § 3.
96. Greene, *Court Reform: What Purpose?*, 58 A.B.A.J. 247, 248 and 250 (1972).

irrespective of the effect on backlogs and trial delays."[97] Efficiency must ultimately reconcile these demands and provide the most just, the most accessible, and the most economical system attainable.

What is needed to achieve such a system? As a first step, S.J.R. 113 would place responsibility for the management and administration of the judicial system in the supreme court, authorizing the court to provide commissioners and other personnel pursuant to court rule.[98] The chief justice would be the chief administrative officer, with supervisory power over the entire judicial system.[99] The structure delineated by these new sections, charging the supreme court with administrative policy and the chief justice with implementation of that policy, has been advocated by the consensus statements of national and local conferences[100] and by the American Bar Association.[101] If the role of the chief justice is to be expanded as proposed, it is essential that he be selected with this fact in mind. In this particular, S.J.R. 113 would improve the existing provision for selecting the chief justice.[102] Vigorous administration and exercise of the disciplinary power might make an effective chief unpopular with some colleagues and, indirectly, with voters. If justices are to stand for popular election, the chief should be protected from ballot-box retaliation for a job well done.[103]

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97. *Id.* at 248.

98. S.J.R. 113 provides:

Section 17. MANAGEMENT AND ADMINISTRATION. The management and administration of the courts shall be vested in the supreme court and shall include the power to provide for court commissioners and court personnel pursuant to court rule unless the legislature, by a two-thirds vote, shall provide otherwise by statute.

99. *Id.* § 15(3). This provision was not in the original joint resolution. It was added as part of the Substitute Senate Joint Resolution. The sub-section provides:

(3) Administrative Role. The chief justice shall be the chief administrative officer of the judicial system of the state of Washington and shall supervise and direct the performance of the management and administrative duties of the judicial system and shall preside at all sessions of the supreme court. The chief justice shall designate another member of the court to preside during such times as he may be absent from sessions of the court.

100. 1971 Nat'l Conf. on the Judiciary, *Consensus Statement,* in JUSTICE IN THE STATES 265 (F. Swindler ed. 1971); 1972 Citizens' Committee on Washington Courts, Conference Summary, Item 4(a).

101. ABA MODEL STATE JUDICIAL ARTICLE § 8, ¶ 2 (1962).

102. Section 15(1) of the proposed amendment calls for election of the chief by a majority of the supreme court. The existing provision, WASH. CONST. art. IV, § 3, specifies that the justice "having the shortest term to serve not holding his office by appointment or election to fill a vacancy" shall be chief justice.

103. As originally introduced, section 15(2) provided simply that "The term as chief justice shall be established by statute or rule authorized by statute." When the adminis-

A. Utilization of Personnel

To discharge his proposed duties, the chief justice must administer a system employing persons engaged in two different types of activity. One group will hear and decide cases, performing the strict role of a judge. The second group will do research, set calendars, arrange facilities and provide kindred support services for the judges. By reason of his own training, the chief justice will understand the work of the first group but nothing in his professional education specially equips him to supervise the work of the second group. Hence, persons with appropriate management skills—an administrator for the courts and his staff—should be available to assist the chief justice with the second function but should not be permitted to interfere with the first. The administrative pattern should reflect this division of labor.

Judges' time is the most essential and expensive resource utilized in the judicial system. To be minimally acceptable, an administrative system must manage calendars,[104] witnesses and juries,[105] "lawyer concentration,"[106] and comparable "flow" problems in a way which maximizes that resource. Beyond these obvious steps, what can be done to obtain more judging per judge?

Evidence seems to indicate that not all judges are equally busy. If case filings are a meaningful measure of work[107] the discrepancy is

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trative role of the chief justice was broadened (*see* notes 5-8 *supra*), the need for special tenure was recognized; thus in the substitute resolution section 15(2) provides:

> TENURE. The chief justice shall not be required to stand for reelection by the electorate during his term as chief justice until the second general election following the selection of his successor as chief justice, unless his term as chief justice ends more than two years prior to the expiration of his regular term as a justice of the supreme court.

104. An explanation of the "fantastic improvements" which can be made by careful calendaring is offered by Clark, *The Federal Judicial Center*, 53 JUDICATURE 99 (1969).

105. Chief Justice Warren E. Burger, in *Court Administrators—Where Would We Find Them?*, 53 JUDICATURE 108, 109 (1969), estimates an 80 percent waste of citizen time and calls for improvement, while cautioning that "judge time" ought not be used "to accomplish tasks that others with less training can do at less expense to the public."

106. Former Justice Tom C. Clark has said: "Indeed, I dare say that the cause of the backlog in most of our metropolitan courts today can be laid at the door of the [legal] profession—either on the basis of inefficient operation, insufficient training, concentration of cases in a few firms (especially in admiralty, patents, and antitrust), or lawyers' insistence that they be permitted to control the litigation." Clark, *Judicial Reform: A Symposium, Introduction*, 23 FLA. L. REV. 217, 219 (1971). Professor Hans Zeisel, *Court Delay and the Bar: A Rejoinder*, 53 JUDICATURE 111 (1969), denies that there is evidence to support accusations that lawyer inefficiency and concentration are a cause of lost judge time.

107. There is danger in simply comparing the number of cases handled by judges. Cases in one county may legitimately require, on the average, more time and resources

significant, ranging from as few as 244 annual filings for the superior court judge in one county to as many as 1,402 per judge in another county.[108] Such a variation in workload between judges suggests the need for an effective "visiting judge" program or for a different geographical base for judicial districts.

The State of Washington does have a visiting judge program.[109] The Administrator for the Courts, who makes the arrangements, describes the program as a voluntary one and reports that in 1971 a total of 1,020 days were served by superior court judges in judicial districts other than their own.[110] Predictably, the program has encountered problems. Not all judges participate—882 of the 1,020 days were contributed by fifteen judges, the remaining seventy-seven judges providing only 138 days. There is an inevitable loss of time in travel—the 1,020 days gained cost 252 days lost in travel.[111] Another "cost," difficult to assess, is the disadvantage of having disputes decided by a visitor. There is some validity in the notion that a judge should "have roots in the community if he is to grow in wisdom and understanding of the problems peculiar to those who come before him."[112] There is also a problem of "image" for the judge, especially when he seeks re-election in his home area and feels obligated to explain his periods of absence.

Practical difficulties of this sort with the visiting judge program have made another option, periodic redefinition of judicial districts, attractive. The drafters of S.J.R. 113 undoubtedly had this in mind when they provided that the Judicial Qualifications and Districting Commission "shall biennially conduct a survey of the population and workloads of various judicial districts and, if necessary, redraw the

than those of another county. For example, there may be a tendency to try complex cases in metropolitan areas while more routine matters are handled by rural courts.

108. 1971 ADMINISTRATOR'S REPORT, *supra* note 23, at 75.

109. WASH. CONST. art. IV, § 7 provides that a superior court judge may visit in any county at the request of the resident judge and "upon the request of the governor it shall be his duty to do so." Legislation to implement the constitution has existed since 1890. *See* WASH. REV. CODE §§ 2.08.140, .150 (1959). In 1957, by enactment of WASH. REV. CODE § 2.56.040 (1959), the legislature gave the chief justice of the supreme court authority to direct such visitation and to condition issuance of salary warrants upon compliance. WASH. REV. CODE § 3.34.140 (Supp. 1972) provides authority for a visiting judge program among district courts but does not charge anyone with the duty of arranging for such visits. To visit, a judge must be invited, his county commissioners must agree to his absence, and he must be willing to go.

110. 1971 ADMINISTRATOR'S REPORT at 101-02.

111. *Id.*

112. McKenzie, *Unification and Redistricting*, in JUSTICE IN THE STATES 120 (F Swindler ed. 1971).

boundary lines . . . ."[113] A persuasive argument for fewer and larger districts as an alternative to essentially county-based courts has been made by a Wisconsin study.[114] Since Washington has already experimented with multiple-county judicial districts, it should encounter little difficulty in expanding the practice.[115]

Voluntary programs provide further effective steps in the conservation of judicial time. A limited amount of circuit-riding by district court judges is occurring in Washington[116] and an appreciable volume of judging is being purchased by municipalities from district courts.[117] These efforts are illustrative, one hopes, of what will be accomplished state-wide if a unified system is organized in which administrative responsibility is assigned.

B. An Administrator for the Courts

It is regrettable that the proposed Judicial Article would not constitutionally provide for the office of Administrator for the Courts, as the need for specialized, professional, administrative assistance in the operation of the judicial system is now almost universally conceded. Of course, the administrator should be responsible to the supreme court or, perhaps better, to the chief justice, and it is appropriate that the person should be appointed and dismissed by the supreme court. It is the office, not the official, which should be constitutionally protected from political anger or caprice.

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113. S.J.R. 113, § 14 provides as follows:

DISCIPLINE AND REMOVAL. (1) Judicial Qualifications and Districting Commissions. . . . The commission shall establish judicial districts within the state and shall biennially conduct a survey of the population and workloads of the various judicial districts and, if necessary, redraw the boundary lines of the districts to conform to changes in population and workload found by its survey . . . .

114. Citizens' Study Comm. on Judicial Organization, *supra* note 35, at 75-76.

115. Washington has thirty-nine counties arranged, by legislative enactment, into twenty-eight judicial districts. Nine districts have two counties, and one district is composed of three counties, WASH. REV. CODE §§ 2.08.061-.065 (1959).

116. In Clark and Whatcom counties the district court judges travel to municipalities on a fixed schedule. Court sessions accordingly are held on a limited but predetermined number of days. The municipality provides the physical facility and pays a pro rata share of the judge's salary.

117. 1971 ADMINISTRATOR'S REPORT at 21 indicates that fifty-eight municipalities purchase judicial services. The payment in these arrangements is made by permitting the district court to retain the filing fee. Revenue other than the filing fee is disbursed to the municipality. One county audit shows that the cost of each case handled in 1969 under this arrangement was $11.41 and that the county accordingly was subsidizing the munic-

Existing legislation in Washington establishing the office of Administrator for the Courts is a good beginning.[118] The duties presently assigned to the administrator include gathering and evaluation of data, budget development, assignment of judicial and support personnel, and general examination of the clerical methods or systems being used. The administrator also serves as secretary for the annual conference of judges of courts of record, undoubtedly a valuable contact. The responsibilities assigned to the administrator are appropriate: what his office lacks is structural legitimacy and authority. Implementation of the administrator's work ultimately depends upon his recommendations to the chief justice and to the judicial council. The difficulty with this arrangement is that the state supreme court and the judicial council, as now structured, are themselves without express administrative authority. The supreme court undoubtedly has some sort of inherent supervisory power over the entire state judiciary. However, until that managerial role is more clearly defined, the court will be hesitant and on come occasions unwilling to act. Effort by the administrator, accordingly, can be readily frustrated under the existing system.

C. The Legislature and Administration of the Courts

The advantages of good management and administration have been recounted so frequently that to do it again is inappropriate. However two specific items, both identified in House Concurrent Resolution 121,[119] should be mentioned: (1) to what extent should the *legislature* "determine some aspect of initiating or altering administrative practices and procedures utilized by the courts," and (2) what information can be made available to enable the legislature "to adequately evaluate the need for additional judges . . ."?

The extent to which the legislature determines details of staff, budget, and operation of the judiciary is truly remarkable in light of the "separate and equal branches of government" theory. Discussing the right of the judiciary to manage its own affairs, Dean Pound once

ipalities in the amount of $7.41 per case. KING COUNTY AUDITOR, REVIEW OF JUSTICE COURT OPERATIONS 11 (April 19, 1971). *Cf.* note 45 *supra.*

118. WASH. REV. CODE ch. 2.56 (1959).

119. *See* note 2 *supra.*

remarked that: "Even the pettiest state agency has much more control than the average state court."[120] In Washington, the legislature versus court contest has surfaced most clearly with respect to the rule-making power. The rule-making power of the state supreme court is conferred by statutory grant,[121] not by the constitution. Concerning procedural and administrative matters, it is clear that a court rule can abrogate a prior statute.[122] Apparently the court in this state has not had to decide whether it has inherent rule-making power.[123]

A glance at the proposed amendments to S.J.R. 113 demonstrates how this tug-of-war is being continued. As originally drafted, for example, section 1(2) provided that in addition to the supreme court, court of appeals, and superior courts, other courts could be made courts of record by statute *or by rule* authorized by statute. Section 1(4) originally provided that temporary assignment of judges could be made pursuant *to court rule* or statute, and section 1(5) said that decisions are to be documented as required by statute *or rule*. The proposed amendments under consideration in the Senate Judiciary Committee would delete reference to the court rule in each of these instances. Under the proposed amendments, even the court's power to provide by rule for court personnel would be subject to reversal by a statute adopted by a two-thirds vote of the legislature. Only the court's power to adopt rules for "procedure of all courts," provided by section 16, is without qualification.

Are these proposed limitations on the grant of rule-making power simply an indication of legislative jealousy? Probably not. More likely they reflect lack of confidence in the administrative capacity of the judiciary, for the court historically has failed to demonstrate the capacity to manage its own affairs well. The self-perpetuating cycle im-

120. *Quoted in* Pringle, *The Role of the State Chief Justice*, in JUSTICE IN THE STATES 82 (F. Swindler ed. 1971).

121. WASH. REV. CODE §§ 2.04.180, .190 (1959).

122. WASH. REV. CODE § 2.04.200 (1959): "Effect of rules upon statutes. When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect."

123. State v. Williams, 156 Wash. 6, 286 P. 65 (1930); State v. Pavelich, 150 Wash. 411, 273 P. 182 (1928); State *ex rel.* Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928). In the *Foster-Wyman* decision the court said, in dicta, that there was "excellent authority . . . that the making of rules governing procedure and practice in courts is not at all a legislative, but a purely judicial, function." *Id.* at 4, 267 P. at 771. It continued, however, by saying that it need not, in the case before it, pursue the "interesting . . . question . . . of legislative usurpation of judicial powers . . . ." *Id.* at 5, 267 P. at 771.

plicit in this reasoning can be broken only by assigning administrative responsibility to the court and demanding effective use of the authority conferred. To effectuate such a transfer, an effective administrator operating within a unified court structure is indispensable.

Solution of the second legislative concern—the generation of data to be used by the legislature in determining when additional judges are needed—also requires the existence of an effective administrator's office. Judges' time is the most vital and costly resource in the judicial system. The tendency is to measure success of the judicial operation by the size of the case backlog and to assume that the only way to reduce the backlog is to obtain more judges. Both these assumptions are open to question. The *number* of cases waiting is not as important as the *time* which will be required to process those cases,[124] and "experience teaches that the omnibus creation of new judgeships has not been the answer."[125] While the legislature has been reasonably generous in the creation of new judicial positions,[126] whether these positions were justified and whether the "backlog" problem has been ameliorated are fair questions. The most recent report of the Office of the Administrator for the Courts states that:[127]

> There is no means of accurately evaluating the quality of a decision other than the crucible of time and the effect the opinion has had on the development of the common law. Delay, however, can be precisely determined and comparisons made.

The report then examines delay in *appellate* review, concluding that there has been an improvement since establishment of the court of appeals. What is missing is data concerning the far greater question of performance of the *trial* courts. Data upon that significant issue are either nonexistent or of virtually unusable quality. Courts in Washington have not yet entered the age of mechanized data retrieval.[128]

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124. "Only two states (California and New York) transcend the single case as the unit of delay measurement by translating delay into terms of predicted court time." *The Quality of State Judicial Statistics,* 53 JUDICATURE 160, 161 (1969). Washington is just beginning to develop information relating types of cases to time and expense.

125. Clark, *Judicial Reform: A Symposium, Introduction,* 23 FLA. L. REV. 217, 221 (1971).

126. Prior to 1971 there were eighty-eight superior court judges in Washington. The number was increased to ninety-two by ch. 83 [1971] Wash. Laws, 1st Ex. Sess., and to ninety-eight by S.S.B. 2227, 43d Wash. Legis., 1st Ex. Sess. (1973).

127. 1971 ADMINISTRATOR'S REPORT at 62-63.

128. The superior court administrators (there are now six in the state) and the county clerks met on May 1 and 2, 1973, to discuss the possibility of developing data

CONCLUSION

A new judicial article is needed. Whether it features a single trial/single appeal or multiple appeal court structure is not as critical as the fact that it be *unified* and that it be a *system*. Until that is accomplished, efforts toward efficient budgeting, discipline, and administration are doomed to remain makeshift add-ons to an obsolete, turn-of-the-century mechanism, a situation in which good people are seriously handicapped by a bad structure.

retrieval capacity. It is the objective of the group to begin developing machine records this year.